



NETWORK
SOLUTIONS'

August 11, 1999

The Honorable Tom Bliley
Chairman, Committee on Commerce, Science and Transportation
U.S. House of Representatives
Rayburn House Office Building
Congress of the United States
Washington, D.C. 205 15-6115

Dear Chairman Bliley:

On behalf of Network Solutions, Inc. ("NSI"), I appreciate the opportunity to respond to the questions contained in your July 27, 1999 letter to me. I have repeated below your questions, followed by my responses.

Question 1

During your testimony last week before the Subcommittee on Oversight and Investigations, you indicated that NSI is claiming a proprietary right to the data in the WHOIS database, which apparently is the same data that will be used in the dot corn directory. Regarding NSI's proprietary claims to this data:

- a. *Please identify all individual and aggregate data elements to which NSI is claiming a proprietary right;*
- b. *For each data element identified in response to request La., provide a detailed explanation of the legal analysis under which NSI is claiming a proprietary right to the data element in question. All legal analyses should identify the nature of the proprietary right being claimed, such as trade secret or copyright, and whether the proprietary right being claimed is exclusive or non-exclusive; and,*
- c. *If NSI is interpreting the Cooperative Agreement in such a manner as to support more than one analysis that would permit claiming a proprietary right to the data element identified in request La., include detailed explanations of all such alternative analyses. All alternative legal analyses should identify the nature of the proprietary right being claimed, such as trade secret or copyright, and whether the proprietary right being claimed is exclusive or non-exclusive.*

Response

We believe that your first question is best answered, in part, by reproducing below our answer to a similar question included among a number of interrogatories we received from the U.S. Department of Justice in Civil Investigative Demand No. 19 198.

The interrogatory is as follows:

1. Identify any “registrant data” to which your company asserts any “exclusive or non-exclusive right or interest,” and separately for each identified item of information, describe in detail the basis for such assertion.

Our response to that interrogatory is set forth below:

i. The Nature of The Registrant Data:

As defined in the Schedule, “registrant data” includes information provided by entities and individuals through a Web-based registration form submitted to the Network Solutions, Inc. registrar (“NSI registrar”) to register Internet domain names in the .com, .net, and .org top-level domains (“TLDs”). Registrant data also includes information submitted by other domain name registrars to the Network Solutions, Inc. registry (“NSI registry”) on behalf of entities and individuals in connection with applications to register Internet domain names in the .com, .net, and .org TLDs. The NSI registrar and the NSI registry are denominated and discussed separately in these Responses. In the course of performing its functions, the NSI registrar compiles data regarding its registrants into various databases and sub-databases. The NSI registry also compiles registrant data obtained from domain name registrars into a database. These databases are discussed separately below.

1. The NSI Registrar:

The information submitted to the NSI registrar, in an application to register an Internet domain name, includes identifying information (*i.e.*, name and address) regarding the individual or organization with whom the NSI registrar contracts to maintain a domain name registration record (the “registrant”); information regarding the designated administrative, billing and technical contacts for the domain name registration contract; and the name and Internet protocol (IP) numbers of the primary and secondary servers (usually an Internet Service Provider’s (“ISP’s”)) associated with (“hosting”) the second-level domain name. (Registrants choose their own ISP to host their e-mail service and/or a web site. These servers act as electronic “traffic cops” to direct transmissions to the domain name to appropriate locations.)

If a domain name application is accepted by the NSI registrar, the information contained in the registration form is compiled into various databases and used in connection with the NSI registrar’s registration services, domain name availability look-up services (WHOIS and RWHOIS), and its internal financial, business, and dispute management functions.

2. The NSI Registry:

Registrant data submitted by registrars to the NSI registry in an application to register an Internet domain name includes only the domain name being registered and the hostnames and IP numbers of the primary and secondary servers associated with the domain name and the identity of the registrar involved. No other registrant data is provided to the NSI registry by registrars. All rights in that registrant data reside with each of the respective registrars, subject to a non-exclusive, non-transferable, limited license from each registrar to the NSI registry for the propagation of and the provision of authorized access to the files used to match Internet domain names to IP numbers for routing of communications over the Internet.

ii. Bases for the Company's Asserted Rights:

The NSI registrar asserts an exclusive right or interest in the database of registrant data, as identified above, obtained from its registration customers as a whole and in the secondary databases of registrant data which are extracted from the entire database of registrant data and re-aggregated from time to time. The NSI registry asserts a non-exclusive right or interest in the registrant data co-extensive with the agreement entered into with each registrar.

To understand this response, some background may be helpful. NSI began performing its domain name registration functions according to Cooperative Agreement No. NCR-92-1 8742. This Cooperative Agreement was effective January 1, 1993 between NSI and the National Science Foundation (the "NSF"). (Responsibility for administering the Cooperative Agreement was transferred from the NSF to the Department of Commerce on September 9, 1998.) In addition to the Special Conditions contained in Cooperative Agreement No. NCR-92- 18742, the Cooperative Agreement incorporates the NSF's Grant General Conditions and Cooperative Agreement General Conditions. The NSF Grant Policy Manual supplements the terms of the Cooperative Agreement. Thus, when we speak of the "Cooperative Agreement," NSI refers to the agreement as augmented by incorporation of the relevant terms and conditions described above.

The Cooperative Agreement was the result of a project solicitation issued pursuant to the National Science Foundation Act of 1950, as amended (42 U.S.C. §§ 1861 et seq.), and the Federal Cooperative Agreement Act (31 U.S.C. § 6305). The Cooperative Agreement is not a "procurement contract," and is thus not governed by the Federal Acquisition Regulations. In contrast to a procurement contract, which the United States Government uses to obtain goods or services, a cooperative agreement is used when "the principal purpose of the relationship is to transfer a thing of value to the . . . recipient to carry out a public purpose . . . instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government." See 31 U.S.C. § 6305.

Paragraph 754 of the NSF Grant Policy Manual provides that the "NSF normally allows grantees to retain principal legal rights to intellectual property developed under NSF grants." Paragraph 18 of the NSF Grant General Conditions further provides that "[e]xcept as otherwise specified in the award or by this paragraph, the awardee may own or permit others to own copyright in all subject writings." These provisions confirm that any and all intellectual property arising

from the operation of NSI's domain name registration business belongs to NSI. This is consistent with Virginia common law and statutes. Such intellectual property includes, as one example, trade secret rights in the aggregated registrant database and re-aggregated subsets of such data as modified daily and maintained in the course of NSI's business.

This understanding of the parties to the Cooperative Agreement was confirmed by the Congressional testimony of Dr. Joseph Bordogna, the Acting Deputy Director of the NSF, before the U.S. House of Representatives, Committee on Science, Subcommittee on Basic Research on September 25, 1997, in which he stated, "...[U]nder the law and under our Cooperative Agreement, and our statutory authority, the ownership of the database material belongs to the awardee, but the NSF retains the right to get a copy of it at the termination of the Agreement."

The NSF retained the right to receive a copy of the data generated under Paragraph 10.E. of the Special Conditions to the Cooperative Agreement. This paragraph provides that:

The Awardee shall submit electronically and in ten (10) hard copies a final report to NSF at the conclusion of the Cooperative Agreement. The final report shall contain a description of all work performed and problems encountered (and if requested a copy and documentation of any and all software and data generated) in such form and sufficient detail as to permit replication of the work by a reasonably knowledgeable party or organization.

NSI's delivery of a copy of NSI's registration database, were it considered to be "data generated" under paragraph 10.E., either as registry or registrar, if requested, as part of the final report under Paragraph 10.E. does not grant the NSF any rights in either database or respective sub-databases. Any rights the NSF may have in the registrant data are governed by Paragraph 18 of the Grant General Conditions of the Cooperative Agreement which only provides the NSF with a:

[N]onexclusive, nontransferable, irrevocable, royalty-free license to exercise or have exercised for or on behalf of the U.S. throughout the world all the exclusive rights provided by copyright. Such license, however, will not include the right to sell copies or phonorecords of the copyrighted works to the public.

The express copyright license grant from NSI to NSF contained in the Cooperative Agreement further demonstrates that ownership of the registrant data, including all copyrightable material, resides in NSI subject only to this limited license in copyrightable works generated under the Cooperative Agreement.

NSI's ownership of its aggregated databases and re-aggregated subsets of such databases, thus, is predicated on the Cooperative Agreement, including the NSF Grant Policy Manual, as well as Virginia common law and the Virginia Uniform Trade Secrets Act. Virginia's trade secret law, for example, clearly protects

computer software, as well as computer databases consisting of customer information. Likewise, compilations of known elements or items, considered in the aggregate, are **protectible** as trade secrets. In the absence of a written agreement to the contrary, the common law assigns ownership of inventions and trade secrets to their developer. This is consonant with concepts of property that extend beyond land and tangible goods to include the products of labor and invention.

Amendment 11 to the Cooperative Agreement is simply an amendment to the original Cooperative Agreement between the NSF and NSI. As stated in the relevant provision of Amendment 11, nothing “is intended to alter any intellectual property rights of the USG or NSI established in the Cooperative Agreement.” Thus, the issue of rights to the software and data generated under the Cooperative Agreement was not altered by Amendment 11.

Additionally, the National Science Foundation has taken the position on other occasions that the databases developed by NSI in connection with the Cooperative Agreement are the property of NSI. See, for example, the Foundation’s December 24, 1997 response to a request to obtain information from the domain name database under the Privacy Act which denies the request on the basis that “the documents created by a grant recipient are the property of the recipient, not the Federal Government.” (full text available at <http://www.cavebear.com/nsf-dns/nsf-dnc24.htm>). In order to supplement our response to the interrogatory discussed above to include reference to this December 24, 1997 letter from the National Science Foundation. In addition, the Foundation concluded in such letter that the domain name database is not an “agency record” contained in a “system of records” maintained by a Federal agency under the Privacy Act. However, if the Foundation’s conclusions were incorrect and the domain name database is an “agency record” contained in a “system of records” maintained by a Federal agency, and such database was owned by the Foundation and is now owned by the Department of Commerce, the Foundation and the Department of Commerce would be subject to significant financial liability under the Privacy Act for past, present and future disclosures of personal information contained in this database.

The NSI registrar WHOIS database is and has always been made available by NSI to the general public on an interactive basis for the purpose of looking up various data fields associated with specific domain names. This look-up capability is vital to the functioning of the Internet, and we will continue to make this database available on this basis in the future. The WHOIS database has never been made available on a bulk access download basis. However, pending resolution of all outstanding issues with the Department of Commerce and the Internet Corporation for Assigned Names and Numbers, we have agreed to remove restrictions on the use of WHOIS data for third-party development of value-added products and services.

On the other hand, if, as described above, the Foundation’s conclusions about the Privacy Act were incorrect and the WHOIS database was owned by the Foundation and now by the Department of Commerce, it would be impracticable or impossible for the Government to maintain the timely interactive database look-up capability necessary for the Internet to function without violating the Privacy Act.

Question 2

Regarding NSI’s policy of permitting bulk access to the Top Level Domain (“TLD”) Zone File by legitimate users:

- a. *From June 1, 1997 to today, list all the users NSI has permitted to directly access more than one TLD Zone File record at a time;*
- b. *For each user listed in response to question 2.a., indicate whether NSI has ever interrupted the user's access to, or changed the prerequisites related to the user accessing, the TLD Zone File during the time period in question; and,*
- c. *For each indication provided in response to question 2. b., provide a detailed summary of the circumstances related to and rationale behind each instance where NSI interrupted the user's access to, or changed the prerequisites related to the user accessing, the TLD Zone File.*

Response

Until early 1998, NSI allowed anyone to anonymously access the rz.internic.net server to download the Top-Level Domain ("TLD") Zone Files (the "files") for .com, .net, and .org. NSI did not keep any records of access to the files beyond normal server log files, which routinely are expunged after approximately ninety (90) days. We did not impose any criteria or restrictions on who could access the files; we simply placed the files on the server, and anyone who wanted to download them could do so.

In early-to-mid-1998, NSI believed the files were being used to generate high volume, automated, electronic, repetitive queries against the WHOIS database and other servers that handle incoming customer service requests; thus, the uncontrolled access to the files was causing degradation to NSI's system. These problems necessitated that NSI begin controlling access to the files by instituting a password log-on system. Such a system would enable NSI to terminate access for any individual abusing the system. Due to the anonymous nature of the old system, we could not send any notices of this change.

After switching to the password log-on system, any person or organization desiring access to the files only needed to send us an email requesting access. Again, we did not impose any criteria or restrictions on who could access the files, and we did not deny access to anyone requesting it. The only information we maintained on each password holder was the email address of the requesting party and normal server log files. Through early 1999, 560 password holders had access to the files (Exhibit I).

Despite the password log-on system, NSI continued to experience increased system degradation, resulting from automated, high volume, electronic, repetitive requests for information contained in our WHOIS database. We began to see evidence that people were using the files, and information obtained from mining the WHOIS database, to send bulk commercial email to our customers. In early 1999, NSI determined that the only way to stop, or at least minimize, continued abuse of the files was to attach terms and conditions to the access and use of the files. NSI also decided at that time to support the originally intended use of the files, which is to serve as the database files to provide Domain Name System (DNS) service to Internet hosts providing DNS support. We limited access to the files to those who agreed to use them only for the following purposes: (1) to augment the Internet's DNS system by making a copy of the file available locally on their network; or (2) to provide emergency Internet support (e.g., the Computer Emergency Response Team (CERT) at Carnegie-Mellon University). Additionally, in recognition of the need of the intellectual property community to police and enforce their trademark rights, we granted access to those needing the files to search for domain name registrations that were the same as or similar to their trademarks.

NSI developed an easy application for anyone to apply for access to the files, located online at www.netsol.com/tldzone. Additionally, on or about February 4, 1999, NSI sent a letter, via email, to the 560 then current password holders, informing them of the new TLD Zone File Access Program (Exhibit II). For those emails that bounced back due to bad addresses, NSI made every reasonable attempt to contact someone associated with that email to inform them of the new program.

NSI received several applications during the first two-week period. If the applicant's reason for accessing and using the files matched one of the uses stated above, the applicant was accepted into the program. If the reason provided by the applicant was other than the uses described above, the application was rejected and an appropriate email response was sent to the applicant (Exhibits III and IV). For those accepted, NSI sent the appropriate License Agreement to the applicant's email address. Upon receipt of a properly executed License Agreement from the applicant, NSI fully executed the agreement and issued a password (Exhibit V). The new passwords were active and available immediately. Many of those accepted into the program chose not to return an executed License Agreement; therefore, no passwords were issued to those persons or organizations (Exhibit VI). It would be practically impossible to determine which of the old password holders became new password holders, because we had virtually no data about the old password holders. Nevertheless, we made all reasonable attempts to contact the old password holders prior to termination of their passwords on February 19, 1999.

After February 19, 1999, the Department of Commerce raised concerns about NSI's new TLD Zone File Access Program. Specifically, the Department of Commerce believed that NSI had defined the acceptable uses of the files too narrowly. The Department of Commerce wanted NSI to re-open access to the files for anyone, regardless of proposed use, except for the following reasons: (1) to allow, enable, or otherwise support the transmission of bulk commercial email to entities other than existing customers; (2) to enable high volume, automated, electronic processes that apply to NSI (or its systems) for large numbers of domain names; or (3) to enable high volume, automated, electronic, repetitive queries against NSI's WHOIS database or WHOIS databases of third parties.

At the conclusion of our negotiations surrounding this topic with the Department of Commerce, NSI agreed to begin using a new agreement whose term would expire on July 16, 1999 (the "July 16th agreement") for the TLD Zone File Access Program. NSI sent an email to all persons who had requested access after February 4, 1999 to inform them of the changes to the program (Exhibits VII, VIII, IX and X). No interruptions of access or terminations of passwords resulted at this time from instituting the new July 16th agreement.

As it became apparent that we would not resolve all of our outstanding issues with the Department of Commerce by July 16, 1999, NSI sent an amendment extending the term of the July 16th agreement by sixty (60) days through September 16, 1999 (the "extension amendment"). On July 15, 1999, NSI sent the extension amendment, via email, to all parties currently operating under the July 16th agreement. They were given until 5:00 p.m. (EDT) on July 30, 1999 to sign and fax the amendment back to NSI. On Tuesday, July 27, 1999, NSI sent a reminder of the July 30, 1999 deadline. For those who executed extension amendments received by the deadline, NSI did not interrupt or terminate access to the files (Exhibit XI). Additionally, since July 15, 1999, NSI has issued new agreements, which expire on September 16, 1999 (Exhibit XII). For those people or organizations that did not return their executed agreements by the July 30, 1999 deadline, their passwords were terminated on August 3, 1999 (Exhibit XIII).

Question 3

Please answer the following questions:

- a. *Did the subject of proprietary rights in the WHOIS database arise during negotiations between the Department of Commerce and NSI regarding Amendment 11 to the Cooperative Agreement?*
 - i. *If the subject did arise, please describe what action, if any, the Department of Commerce took at the time the subject came up.*
 - ii. *Please provide all records of communications between the Department of Commerce and NSI relating to the action described in response to request 3. a. i.*
- b. *When did NSI first inform the Department of Commerce that it was contemplating asserting proprietary rights to the data in the WHOIS database?*
 - i. *Please describe what action, if any, the Department of Commerce took at the time it received this information from NSI.*
 - ii. *Please provide all records of communications between the Department of Commerce and NSI related to the action described in response to request 3. b. i.*
- c. *When did NSI first inform the Department of Commerce that it was contemplating the use of the data in the WHOIS database to create the dot corn directory?*
 - i. *Please describe what action, if any, the Department of Commerce took at the time it received this information from NSI.*
 - ii. *Please provide all records of communications between the Department of Commerce and NSI related to the action described in response to request 3. c. i.*

Response

The specific subject of proprietary rights in the WHOIS database did not, to the best of our recollection, arise as a separate subject during the negotiations between the Department of Commerce and NSI, regarding Amendment 11 to the Cooperative Agreement. The entire subject of intellectual property rights, however, did arise when the Department of Commerce offered new language which, it was believed by NSI, would have altered the existing terms and conditions of the Cooperative Agreement. Specifically, I am referring to two sections contained in a draft term sheet faxed by the General Counsel of the Department of Commerce, Andrew J. Pincus, to J. Dennis Heipt, a Director of NSI, on August 6, 1998. The first section, entitled "Enabling Newco", is set forth below:

NSI shall grant an exclusive license, and the right to sublicense to any party on any basis, to Newco in any and all intellectual property and data (including, but not limited to, know how, technical data, software, patents, copyrights, documentation)

to enable Newco to carry out its responsibilities as described in the Statement of Policy. NSI warrants items transferred through license or assignment. NSI will provide technical assistance to utilize same. USG will be provided a royalty-free, paid up license to same to practice on a world-wide basis.

The second section, entitled "Rights in Data", is also set forth below:

NSI agrees to deliver to the USG, upon 30 days written notice, a copy of any data, including but not limited to, data, software, databases, and other information or documentation arising out of the Cooperative Agreement, in a form and sufficient detail as to permit continuation or replication of NSI's provision of registrar and registry services by a reasonably knowledgeable party or organization. The data may be delivered by the USG to one or more entities or persons, including non-governmental entities, whether for-profit or not-for-profit, for the purpose of: (1) permitting Newco to fulfill its mission as described in the *Statement of Policy on Domain Name Management* dated June 5, 1998; (2) maintaining the stability and smooth operation of the DNS system; and (3) promoting the growth of competition in domain name registration.

A number of discussions ensued concerning this issue. Ultimately, the following provisions were included in Amendment 11 to the Cooperative Agreement under the heading "Software and Data":

Not later than 30 days after the date of this agreement, NSI shall submit to the USG and electronic copy of all software and data generated under the Cooperative Agreement through September 30, 1998.

Not later than 60 days after the date of this agreement, NSI shall submit to the USG all existing documentation for such software and data generated through September 30, 1998.

The USG will take appropriate measures, including the development and execution of confidentiality agreements acceptable to NSI, to protect the confidentiality of such data, software and documentation so delivered. To the extent any such software, data or documentation need to be made available to any agent, contractor or project partner of the USG, the USG will promptly so notify NSI and will require such agent, contractor or project partner to comply with similar appropriate confidentiality requirements; provided, however, that except as otherwise expressly provided herein, nothing in this paragraph is intended to alter any intellectual property rights of the USG or NSI established in the Cooperative Agreement.

We will provide you under separate cover with all records of communications between the Department of Commerce and NSI that are responsive to your questions 3.a. 1 and 3.a.2.

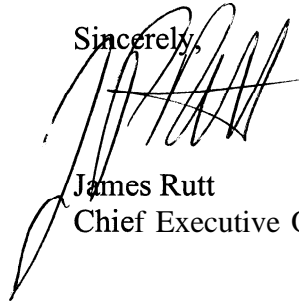
The dot corn directory is a value-added look-up service that facilitates identifying and locating the NSI registrar's customers. The dot corn directory will use information that identifies the individual registrant of an Internet domain name, which will then be combined with additional information about that registrant provided by other information vendors and/or the registrants themselves. It is expected that the dot corn directory may include the following types of information: the company's address and phone number; a map of and directions to the company; a list of subsidiaries and divisions; the company's logo; e-mail addresses; fax numbers; product information; news and financial information; and a link to a yellow-pages type listing. Company listings may also contain links, allowing users to e-mail the company or access the company's e-commerce site. Listed companies will be able to monitor the amount of traffic their listings receive,

NSI announced to the public its anticipated release of its dot corn directory service by issuing a press release on April 19, 1999 (Exhibit XIV). The press release states in relevant part that: "Initially, the dot corn directory will be created by compiling Network Solutions' 4 million web address registrations ending in *.com*, *.net* and *.org* with *infoUSA.com*'s industry leading database of 11 million small businesses." NSI issued a second press release on June 9, 1999 (Exhibit XV) announcing a marketing agreement with InfoSpace.com, Inc. ("InfoSpace.com") pursuant to which InfoSpace.com would distribute, display and transmit NSI's upcoming dot corn directory through the InfoSpace.com web site and its affiliate network.

In apparent response to a newspaper article discussing the dot corn directory in the July 22, 1999 edition of *The Washington Post* (Exhibit XVI), Andrew J. Pincus, General Counsel of the Department of Commerce, sent a letter dated July 23, 1999 (Exhibit XVII) to me. My response to this letter is enclosed (Exhibit XVIII).

Thank you again for the opportunity to respond to your request.

Sincerely,

A handwritten signature in black ink, appearing to read "James Rutt", written over the word "Sincerely,".

James Rutt
Chief Executive Officer

cc: The Honorable John D. Dingell, Ranking Member